SUPREME COURT, U.S.
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# Supreme Court of the United States

HENRIETTA BROWNING,

*Petitioner,*

v.

UNITED STATES OF AMERICA, *et al.*,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), this Court held that a trier of fact may infer the existence of a discriminatory motive from falsity of a defendant's explanation of its action. The question presented is:

> In a discrimination case tried to a jury, should the trial judge if requested to do so instruct the jury that it may draw the inference permitted by *Reeves*?

## PARTIES

The petitioner is Henrietta Browning. The respondents are the United States of America, the United States Department of Treasury, the United States Internal Revenue Service, and Henry Geithner, Secretary of the Department of the Treasury. Secretary Geithner is sued in his official capacity, and is substituted for his predecessor pursuant to Fed. R. App. P. 43(c)(2).

TABLE OF CONTENTS


| | Page |
|---|---|
| Question Presented | i |
| Parties | ii |
| Opinions Below | 1 |
| Jurisdiction | 1 |
| Statutory Provision Involved | 2 |
| Statement | 2 |
| Reasons for Granting The Writ | 5 |
| I. There Is A Well Established Inter-Circuit Conflict Regarding Whether A Trial Judge Must, If Requested, Give A *Reeves* Inference Instruction | 5 |
| A. The Second, Third, Fourth, Fifth and Tenth Circuits Require That A Trial Judge Give A *Reeves* Inference Instruction If Requested | 9 |
| B. The Seventh, Ninth and Eleventh Circuits Hold That A *Reeves* Inference Instruction Is Never Mandatory | 12 |
| C. This Inter-Circuit Conflict Is Widely Recognized | 14 |
| II. The Question Presented Is of Manifest and Considerable Importance | 18 |
| III. The Decision of The Court of Appeals Is Clearly Incorrect | 21 |

TABLE OF CONTENTS – Continued

Page

IV. This Case Presents An Excellent Vehicle for Resolving The Question Presented..... 30

Conclusion..... 32

Appendix

Opinion of The Court of Appeals for The Ninth Circuit, May 22, 2009.....1a

Judgment of The United States District Court for the District of Oregon, May 2, 2009.....11a

Opinion of The Court of Appeals for The Ninth Circuit, June 16, 2009.....12a

Transcript of District Court Hearing, April 27, 2007 .....14a

Order of The Court of Appeals for The Ninth Circuit Denying Rehearing and Rehearing En Banc, August 12, 2009.....16a

# TABLE OF AUTHORITIES

Page

CASES:

*Cabrera v. Jakabovitz*, 24 F.3d 372 (2d Cir. 1994) ..... 8, 9, 10, 11, 16

*Cassino v. Reichold Chemicals, Inc.*, 817 F.2d 1338 (9th Cir. 1987) ..... 4

*Conroy v. Abraham Chevrolet-Tampa, Inc.*, 2003 WL 25738230 (M.D. Fla.) ..... 17

*Conroy v. Abraham Chevrolet-Tampa, Inc.*, 375 F.3d 1228 (11th Cir. 2004) ..... 8, 14, 15, 18

*Fite v. Digital Equipment Corp.*, 232 F.3d 3 (1st Cir. 2000) ..... 8, 14, 16, 18

*Gehring v. Case Corp.*, 43 F.3d 340 (7th Cir. 1994) ..... 8, 13

*Kanida v. Gulf Coast Medical Personnel, LP*, 363 F.3d 568 (5th Cir. 2004) ..... 16

*Kozlowski v. Hampton School Bd.*, 77 Fed.Appx. 133 (4th Cir. 2003) ..... 12, 23

*Moore v. Robertson Fire Protection District*, 249 F.3d 786 (8th Cir. 2001) ..... 8, 14, 16

*Ratliff v. City of Gainesville, Texas*, 256 F.3d 355 (5th Cir. 2001) ..... *passim*

*Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) ..... *passim*

*Smith v. Borough of Wilkinsburg*, 147 F.3d 272 (3d Cir. 1998) ..... *passim*

*St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) ..... 7, 10, 19

TABLE OF AUTHORITIES – Continued

Page

*Townsend v. Lumbermens Mutual Cas. Co.*, 294 F.3d 1232 (10th Cir. 2002) ..... *passim*

*Valle v. National Basketball Association*, 42 F.Supp. 334 (S.D.N.Y. 1999) ..... 10

*Watson v. Southeastern Pennsylvania Transp. Authority*, 207 F.3d 207 (3d Cir. 2000) ..... 10, 11, 18

*Wright v. West*, 505 U.S. 277 (1992) ..... 7

STATUTES AND REGULATIONS:

28 U.S.C. § 1254(1) ..... 2

Section 703(a)(1), Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) ..... 2, 8, 18, 26

F.R.C.P. 51 ..... 30

Age Discrimination in Employment Act ..... 18

Americans with Disabilities Act ..... 18, 19

Fair Housing Act ..... 19

Fair Labor Standards Act ..... 19

Section 1981 ..... 19

Section 1982 ..... 19

BRIEFS:

Brief of The Equal Employment Opportunity Commission as *Amicus Curiae*, *Ratliff v. City of Gainesville*, No. 99-41472 (5th Cir.) .... 11, 20, 27, 28

TABLE OF AUTHORITIES – Continued

Page

Brief of The Equal Employment Opportunity Commission as *Amicus Curiae*, *Townsend v. Lumbermens Mutual Casualty Co.*, No. 00-3055 (10th Cir.) .....12, 20, 27

Brief of The U.S. Equal Employment Opportunity Commission as *Amicus Curiae*, *DiJoseph v. Invivo Research, Inc.*, No. 03-13754-HH (11th Cir.) .....17, 20, 26, 27, 28

Brief of The U.S. Equal Employment Opportunity Commission as *Amicus Curiae*, *Conroy v. Abraham Chevrolet-Tampa, Inc.*, No. 03-11405-GG (11th Cir.), 2003 WL 23744565 .....26, 29

OTHER AUTHORITIES:

C. Belmont, "The Imperative of Instructing on Pretext: A Comment on William J. Vollmer's Pretext in Employment Discrimination Litigation: Mandatory Instructions for Permissible Inferences?", 61 Wash. & Lee L.Rev. 445 (2004).....17

C. Wheeler, "Comments on Pretext in Employment Discrimination Litigation: Mandatory Instructions for Permissible Inferences?", 61 Wash. & Lee L.Rev. 459 (2004).....17

Comment, "Pretext Instructions in Employment Discrimination Cases: Inferring A New Disadvantage for Plaintiffs," 57 Fla.L.Rev. 411 (2005).....17

TABLE OF AUTHORITIES – Continued

Page

E. Jones, J. Dugas, and J. Youpa, "Employment and Labor Law," 58 S.M.U.L.Rev. 785 (2005) .....17

K. Smith, "How Do We Work This? Making Sense of the Liability Standard in 'Disparate Treatment' Employment Discrimination Cases," 14 Me.B.J. 34 (1999) .....18

S. Kaminshine, "Disparate Treatment As A Theory of Discrimination: The Need for A Restatement, Not A Revolution," 2 Stan. J.Civ.Rts. & Civ.Liberties 1 (2005) .....17

T. Devine, Jr., "The Critical Effect of a Pretext Jury Instruction," 80 Den.U.L.Rev. 549 (2003) .....18

W. Corbett, "Of Babies, Bath Water, and Throwing Out Proof Structures: It Is Not Time to Jettison *McDonnell Douglas*," 2 Employee Rts. & Emp. Pol'y J. 361 (1998) .....18

W. Vollmer, "Pretext in Employment Discrimination Litigation: Mandatory Instructions for Permissible Inferences?", 61 Wash. & Lee L.Rev. 407 (2004).....17

Petitioner Henrietta Browning respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on May 22, 2009.

## OPINIONS BELOW

The May 22, 2009 opinion of the court of appeals, which is reported at 567 F.3d 1038, is set out at pp. 1a-10a of the Appendix. The June 16, 2009 opinion of the court of appeals, which is unofficially reported at 2009 WL 1974589 (9th Cir. 2009), is set out at pp. 12a-13a of the Appendix.[1] The pertinent portions of the District Court hearing of April 27, 2007, regarding jury instructions, is set out at pp. 14a-15a of the Appendix. The August 12, 2009 order of the court of appeals, denying rehearing and rehearing en banc, which is not officially reported, is set out at pp. 16a-17a of the Appendix.

## JURISDICTION

The decision of the court of appeals was entered on May 22, 2009. A timely petition for rehearing and rehearing en banc was denied on August 12, 2009.

[1] The June 16, 2009 opinion superseded an unpublished opinion on the same subject issued on May 22, 2009. See 2009 WL 1426796 (9th Cir.).

The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) provides:

> It shall be an unlawful employment practice for an employer –
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin....

## STATEMENT

Plaintiff-appellant is an employee of the Internal Revenue Service call center in Portland, Oregon. In 2003 she filed suit under Title VII of the 1964 Civil Rights Act, alleging that she had been demoted because of her race and in retaliation for having complained about racial discrimination. At trial plaintiff relied heavily on evidence that the explanations that the defendants had given for that demotion were untrue.

At the close of trial, plaintiff requested that the following jury instruction be given to the jury:

> Consistent with the general principle of law that a party's dishonesty about a material fact may be considered as affirmative evidence of guilt, if you find that the defendants' explanation about why they took adverse action against a plaintiff is not worthy of belief, you may infer a discriminatory or retaliatory motive from that fact.

(App. 4a). That instruction was based on, and closely resembled, the holding in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000):

> In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt."

530 U.S. at 147. The district court refused to give the requested instruction. The district judge, in rejecting this instruction, relied on its understanding that all instructions regarding permissive inferences were disapproved by the Ninth Circuit.[2] The jury returned

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[2] App. 15a:

> I'm mindful of Ninth Circuit authority that cautions trial judges against giving any kind of inference

(Continued on following page)

a verdict for the defendants. The plaintiff appealed, arguing that the denial of the requested instruction was improper.

The court of appeals upheld the refusal of the trial judge to give the requested instruction. The Ninth Circuit did not dispute that the requested inference instruction was a correct statement of the law. It recognized that there is a circuit split on this issue, and that other circuits have held that such an instruction is mandatory. (App. 7a). The panel nonetheless held that a trial judge is not required to grant a request to give any instruction other than an explanation of the essential elements of the plaintiff's claim.

> [I]f the jury instructions set forth the essential elements the plaintiff needs to prove, the district court's refusal to give an instruction explicitly addressing pretext is not reversible error.

(App. 7a). The court of appeals reasoned that its 1987 decision in *Cassino v. Reichold Chemicals, Inc.*, 817 F.2d 1338 (9th Cir. 1987), decided thirteen years before *Reeves*, precludes requiring the instruction at issue. (App. 5a-7a). The panel ruled that in the Ninth Circuit it is not the responsibility of the trial judge to explain (or reveal) to the jury the rule in *Reeves*;

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> instruction, and I'm mindful of the risk that an inference instruction can be seen as potentially a comment on the evidence....

rather, the judge need only leave plaintiff's trial counsel in closing argument "free to explain ... that finding the IRS's proffered reasons for Browning's demotion pretextual could justify the jury finding the IRS had discriminated against Browning." (App. 9a).[3]

Plaintiff filed a timely petition for rehearing en banc. The petition noted that the argument advanced in this case by the Department of Justice, that a *Reeves* inference instruction is not mandatory if requested, is squarely contrary to the longstanding position of the Equal Employment Opportunity Commission.[4] The petition was denied on August 12, 2009. (App. 16a-17a).

## REASONS FOR GRANTING THE WRIT

### I. THERE IS A WELL ESTABLISHED INTER-CIRCUIT CONFLICT REGARDING WHETHER A TRIAL JUDGE MUST, IF REQUESTED, GIVE A *REEVES* INFERENCE INSTRUCTION

This case presents a sharp conflict among the courts of appeals regarding whether a jury should be instructed (if a party so requests) that it may infer

[3] In a separate unpublished opinion the panel held that the action of the trial judge in excluding certain evidence proffered by Browning was not error. (App. 12a-13a). That decision is not at issue in this petition.

[4] Petition for Rehearing En Banc, at 12-13.

the existence of an unlawful discriminatory purpose if it concludes that a defendant's explanation for the disputed action is untrue. Five circuits have held that such an instruction is mandatory. In the instant case the Ninth Circuit has joined the Seventh and Eleventh Circuits in holding, to the contrary, that such an instruction need not be given.

For a quarter of a century the federal courts have struggled with the issue of whether the existence of an unlawful discriminatory[5] purpose can be inferred from the falsity of a defendant's explanation of its actions. That question is of overarching importance to the large number of discrimination cases in federal court, because plaintiffs generally rely heavily on evidence of such falsity to demonstrate the existence of a discriminatory motive. Prior to 2000, decisions in a number of circuits had held that such an inference is impermissible.[6] Because of the importance of this

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[5] The same question arises regarding what evidence would support an inference of an unlawful retaliatory motive. Although the instant case involves claims of both discrimination and retaliation, for simplicity we refer in the body of the petition simply to an inference of discrimination.

[6] This Court in *Reeves* noted that the Fifth Circuit in that case had

> proceeded from the assumption that a prima facie case of discrimination, combined with sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatory reason for its decision, is insufficient as a matter of law to sustain a jury's finding of intentional discrimination.

530 U.S. at 146.

question, the Supreme Court twice granted certiorari to address it, first in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), and then in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

*Reeves* held as a matter of law that an inference of discrimination may indeed be drawn from a showing that an employer's proffered explanation was not its true reason. 530 U.S. at 146-49.[7] If a federal judge after a bench trial were to rule for the defendant on the ground that it is impermissible – not in that particular case but in general – to draw an inference of discrimination from the falsity of an employer's explanation, that would be reversible error under *Reeves*. In the wake of the decision in *Reeves*, every federal judge who tries a discrimination case fully understands that such an inference is permissible as a matter of

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[7] See 530 U.S. at 147:

> [I]t is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation.... In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." *Wright v. West*, 505 U.S. 277, 296 (1992).... Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.

(Emphasis in original).

law. But most discrimination cases today are decided by juries, whose members of course have never read this Court's opinion in *Reeves*. The question that led to and was resolved by *Reeves* – whether an inference of discrimination can be drawn from the falsity of a defendant's explanation – has thus been replaced by a dispute of equal importance: whether (if such an instruction is requested) a jury must be informed of the permissibility of that inference under *Reeves*.

The panel in the instant case held that such a *Reeves* inference instruction is never required. The court below frankly recognized that its conclusion conflicted with decisions in several circuits which hold that a plaintiff is entitled to the pretext inference requested in this case. "In the years since [1987], a circuit split has emerged on the question of permissive pretext instructions." (App. 7a). The panel opinion cited decisions in seven circuits as illustrating this inter-circuit conflict.[8] Of the circuit court

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[8] App. 7a n.2:

*Compare Townsend v. Lumbermens Mut. Cas. Co.*, 294 F.3d 1232 (10th Cir. 2002), *and Ratliff v. City of Gainesville*, 256 F.3d 355 (5th Cir. 2001), *and Smith v. Borough of Wilkinsburg*, 147 F.3d 272 (3d Cir. 1998), *and Cabrera v. Jakabovitz*, 24 F.3d 372 (2d Cir. 1994), *with Conroy v. Abraham Chevrolet-Tampa, Inc.*, 375 F.3d 1228 (11th Cir. 2004) (holding permissive pretext instruction is not required), *and Moore v. Robertson Fire Prot. Distr.*, 249 F.3d 786 (8th Cir. 2001), *and Fite v. Digital Equip. Corp.*, 232 F.3d 3 (1st Cir. 2000), *and Gehring v. Case Corp.*, 43 F.3d 340 (7th Cir. 1994).

opinions cited by the panel, four had held that such a pretext instruction is mandatory.[9] The defendant itself recognized that the courts of appeals are divided about this issue, and that several circuits hold that a *Reeves* inference instruction must be given if requested.[10]

### A. The Second, Third, Fourth, Fifth, and Tenth Circuits Require That A Trial Judge Give A *Reeves* Inference Instruction If Requested

Five circuits hold that a trial judge must give a *Reeves* inference instruction if requested to do so.

The Second Circuit has since 1994 required the type of pretext instruction which the district court in this case refused to give. *Cabrera v. Jakabovitz*, 24

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[9] The cited decisions requiring a *Reeves* inference instruction were *Townsend*, *Ratliff*, *Smith*, and *Cabrera*.

[10] Appellees' Answering Brief, pp. 32-37:

> A slight majority of the circuit courts that have confronted the issue of whether a permissive inference instruction for pretext should be given have held that, while such an instruction is not error, it is neither required nor an abuse of discrimination to refuse it.... A *per se* requirement that a district court give a permissive inference pretext instruction ... finds no support in the majority of the case authority from other circuits.

The government acknowledged that decisions in the Second, Third and Tenth Circuits required the trial judge to give such an instruction if requested. *Id.* at 36.

F.3d 372 (2d Cir. 1994). Relying on *St. Mary's Honor Center v. Hicks*, the Second Circuit held in *Cabrera* that

> the jury needs to be told ... the jury is entitled to infer, but need not infer, that this burden [of proof] has been met if they find [the facts constituting a prima facie case] and they disbelieve the defendant's explanation.

24 F.3d at 362. The necessity of this instruction is well established in the Second Circuit, where it is referred to as a "*Cabrera* charge." *Valle v. National Basketball Association*, 42 F.Supp. 334, 339 (S.D.N.Y. 1999).

The Third Circuit has twice held that a plaintiff is entitled to an instruction that a jury may infer discrimination from the falsity of a defendant's explanation, reiterating that rule most recently in a decision by then Judge Alito. *Watson v. Southeastern Pennsylvania Transp. Authority*, 207 F.3d 207, 222-23 (3d Cir. 2000) (opinion by Alito, J.); *Smith v. Borough of Wilkinsburg*, 147 F.3d 272, 280 (3d Cir. 1998).

> In *Smith*, the Court held it to be reversible error to fail to instruct the jurors that "they are entitled to infer, but need not, that the plaintiff's ultimate burden of demonstrating intentional discrimination by a preponderance of the evidence can be met if they find that the facts needed to make up the prima facie case have been established and they

> disbelieve the employer's explanation for its decision." 147 F.3d at 280.

*Watson*, 207 F.3d at 222.

At the urging of the EEOC,[11] the Fifth Circuit has adopted the rule in *Cabrera* and *Smith* that a plaintiff is entitled to a *Reeves* pretext inference instruction. *Ratliff v. City of Gainesville, Texas*, 256 F.3d 355, 360-61 (5th Cir. 2001). *Ratliff* held that it was reversible error for the trial court to refuse to give a *Reeves* inference instruction.[12] In the absence of that requested instruction "the jury instructions failed to conform to *Reeves* or to our precedent post-*Reeves*." 256 F.3d at 362. "[T]he district court erred in failing to give an inference instruction." 256 F.3d at 364.

The Tenth Circuit held in *Townsend v. Lumbermens Mutual Cas. Co.*, 294 F.3d 1232, 1241-42 (10th Cir. 2002), that a *Reeves* inference instruction is mandatory, explaining that it was "persuaded by the

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[11] Brief of The Equal Employment Opportunity Commission as *Amicus Curiae*, *Ratliff v. City of Gainesville*, No. 99-41472 (5th Cir.).

[12] The requested instruction was:

> If the Plaintiff disproves the reasons offered by Defendants by a preponderance of the evidence, you may presume that the employer was motivated by age discrimination.

256 F.3d at 359.

position of the EEOC." 294 F.3d at 1241.[13] "[W]e hold that in cases such as this, a trial court must instruct jurors that if they disbelieve an employer's proffered explanation they may – but need not – infer that the employer's true motive was discriminatory." 294 F.3d at 1241.

Most recently the Fourth Circuit has

> h[e]ld that when the evidence presented at trial creates some likelihood that the jury might disbelieve the legitimate, non-discriminatory reasons given by the employer to justify its actions, then the jury should be instructed on this permissible inference.

*Kozlowski v. Hampton School Bd.*, 77 Fed.Appx. 133, 144 (4th Cir. 2003); see *id.* (in such cases the court should "instruct jurors that they may, but need not, infer discrimination from their disbelief of an employer's stated reasons.").

### B. The Seventh, Ninth and Eleventh Circuits Hold That A *Reeves* Inference Instruction Is Never Mandatory

The decision of the Ninth Circuit in the instant case adopts the rule in the Seventh and Eleventh

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[13] See Brief of The Equal Employment Opportunity Commission as *Amicus Curiae*, *Townsend v. Lumbermens Mutual Casualty Co.*, No. 00-3055 (10th Cir.).

Circuits that a *Reeves* inference instruction is not mandatory.

In *Gehring v. Case Corp.*, 43 F.3d 340 (7th Cir. 1994), the Seventh Circuit held that counsel for the plaintiff, not the trial judge, is responsible for explaining to the jury that it may infer the existence of discrimination from the falsity of a defendant's explanation.

> Gehring ... wanted the judge to instruct the jury about one permissible inference: that if it did not believe the employer's explanation for its decisions, it may infer that the employer is trying to cover up age discrimination. This is a correct statement of the law, ... but a judge need not deliver instructions describing all valid legal principles.... Many an inference is permissible. Rather than describing each, the judge may and usually should leave the subject to the argument of counsel.

43 F.3d at 343.

The Eleventh Circuit also insists that a trial judge need not give a *Reeves* inference instruction.

> We agree with [the plaintiff] that his proposed instruction on pretext accurately states the law – the jury's disbelief of an employer's stated reason for termination may be enough to infer intentional discrimination.... We reject [the plaintiff's] contention that *Reeves* requires a pretext instruction to

> be given to the jury in an employment discrimination case.

*Conroy v. Abraham Chevrolet-Tampa, Inc.*, 375 F.3d 1228, 1233 (11th Cir. 2004).

The First and Eighth Circuits have indicated a disinclination to require a *Reeves* inference instruction, but have not squarely decided the issue.[14]

### C. This Inter-Circuit Conflict Is Widely Recognized

Both the Ninth Circuit and the Department of Justice in its brief in the court below expressly recognized the existence of the inter-circuit conflict on this issue. See pp. 8-9, *supra*.

In *Kozlowski v. Hampton School Board* the Fourth Circuit summarized the division among the courts of appeals.

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[14] In *Fite v. Digital Equipment Corp.*, 232 F.3d 3 (1st Cir. 2000), the First Circuit commented that "we doubt that such an explanation is compulsory, even if properly requested." 232 F.3d at 7. That court of appeals did not resolve the issue, however, because there had been no timely request for such an instruction. *Id.*

In a footnote in *Moore v. Robertson Fire Protection District*, 249 F.3d 786 (8th Cir. 2001), the Eighth Circuit remarked, "We do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it." 249 F.3d at 790 n.9.

> Different courts have taken varied approaches ... on the question of whether a court is required to instruct a jury on the inference of discrimination that may be drawn from disbelief of the employer's stated reasons for its actions. At least three circuits have held ... that an instruction on this permissible inference is required, at least in cases where it appears from the evidence that the jury may doubt the employer's stated reasons for its actions, and that the failure to provide the instruction in such circumstances may constitute reversible error.... In contrast, the Seventh Circuit has held that while the instruction may be given, it is not required....

77 Fed.Appx. at 142-43.

In *Conroy* the Eleventh Circuit also acknowledged the split on this issue.

> We do realize that some circuits in the wake of *Reeves*, now require the district courts to include a pretext instruction in their jury charge.... [O]ther circuits have not interpreted *Reeves* to require a pretext instruction.... We agree with those circuits that have not held *Reeves* to govern the question of whether a pretext instruction is necessary....

*Conroy*, 375 F.3d at 1233-34 (contrasting decisions in the Second, Third, Fifth and Tenth Circuits with decisions in the First, Seventh and Eighth Circuits).

In adopting the requirement of a *Reeves* inference instruction, the Third Circuit noted that while "the Seventh Circuit has signified its approval" of the absence of such an instruction, "the Second Circuit has expressly required more." *Smith v. Borough of Wilkinsburg*, 147 F.3d at 279 (quoting *Cabrera*). The Tenth Circuit decision in *Townsend*, which adopted that same requirement, relied on the Second Circuit decision in *Cabrera* and the Third Circuit decision in *Smith*. 294 F.3d at 1237-38. It candidly acknowledged, however, "that other circuits' opinions differ from the *Smith* and *Cabrera* requirements." 294 F.3d at 1238. The First Circuit, while expressing doubts as to the necessity of a *Reeves* instruction, acknowledged that such an instruction was indeed required by the Third Circuit under *Smith*. *Fite*, 232 F.3d at 7.

The Eighth Circuit has similarly recognized that "circuits that have addressed the requirement of pretext instructions are split." *Moore v. Robertson Fire Protection District*, 249 F.3d at 790 n.9 (contrasting decisions in the Second and Third Circuits with decisions in the First, Seventh and Eleventh Circuits). The Fifth Circuit has noted that while several "circuits agree with our decision in *Ratliff*," requiring the giving of a *Reeves* inference instruction, "[m]any of our sister circuits do not understand *Reeves* to *require* that instruction." *Kanida v. Gulf Coast Medical Personnel, LP*, 363 F.3d 568, 574 (5th Cir. 2004) (emphasis in original) (contrasting decisions in the Second, Third, Fifth and Tenth Circuits with decisions in the Eighth and Eleventh Circuits).

The existence of this inter-circuit conflict has also been recognized by other lower courts,[15] the EEOC,[16] and numerous commentators.[17]

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[15] E.g., *Conroy v. Abraham Chevrolet-Tampa, Inc.*, 2003 WL 25738230 at *5 (M.D. Fla.).

[16] Brief of The U.S. Equal Employment Opportunity Commission as *Amicus Curiae*, *DiJoseph v. Invivo Research, Inc.*, No. 03-13754-HH (11th Cir.), at 23.

[17] Comment, "Pretext Instructions in Employment Discrimination Cases: Inferring A New Disadvantage for Plaintiffs," 57 Fla.L.Rev. 411, 413 n.22 (2005) (noting that "[t]here are two prevailing schools of thought on [the issue]," contrasting the decisions in the Second, Third and Fifth Circuits with the decisions in the Seventh and Eighth Circuits); E. Jones, J. Dugas, and J. Youpa, "Employment and Labor Law," 58 S.M.U.L.Rev. 785, 806 (2005) (contrasting decisions in the Second, Third and Tenth Circuits with decisions in the First, Eighth and Eleventh Circuits); S. Kaminshine, "Disparate Treatment As A Theory of Discrimination: The Need for A Restatement, Not A Revolution," 2 Stan.J.Civ.Rts. & Civ.Liberties 1, 15 n.76 (2005) ("[c]ourts are divided over whether juries must be given a pretext instruction"; contrasting decisions in the Second, Third and Tenth Circuits with decisions in the First, Seventh and Eighth Circuits); C. Belmont, "The Imperative of Instructing on Pretext: A Comment on William J. Vollmer's Pretext in Employment Discrimination Litigation: Mandatory Instructions for Permissible Inferences?", 61 Wash. & Lee L.Rev. 445, 447 (2004) (noting "split that has developed in the Courts of Appeals"); C. Wheeler, "Comments on Pretext in Employment Discrimination Litigation: Mandatory Instructions for Permissible Inferences?", 61 Wash. & Lee L.Rev. 459, 463 (2004) (noting "emerging split in the courts of appeals"); W. Vollmer, "Pretext in Employment Discrimination Litigation: Mandatory Instructions for Permissible Inferences?", 61 Wash. & Lee L.Rev. 407, 408 (2004) ("a circuit split currently exists regarding whether a trial court must instruct the jury that it may, but need not, infer intentional discrimination on the part of the employer if the jury disbelieves the employer's

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## II. THE QUESTION PRESENTED IS OF MANIFEST AND CONSIDERABLE IMPORTANCE

The question presented in this case could arise in virtually every federal discrimination and retaliation case tried to a jury. In the vast majority of these cases the plaintiff relies, often heavily, on proof that the defendant's stated reasons for its actions were false. The availability of a *Reeves* inference instruction could affect the trial and the jury instructions in trial of almost all of these cases. In the instant case, as in others, the defendants' insistent opposition to such an instruction is telling evidence of its potential impact on the jury verdict. This issue has been litigated not only (as here) in Title VII cases,[18] but also in cases arising under the Age Discrimination in Employment Act,[19] the Americans with Disabilities

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explanation"); T. Devine, Jr., "The Critical Effect of a Pretext Jury Instruction," 80 Den.U.L.Rev. 549, 549 (2003) (noting the "dispute" among the circuits); K. Smith, "How Do We Work This? Making Sense of the Liability Standard in 'Disparate Treatment' Employment Discrimination Cases," 14 Me.B.J. 34, 40 (1999) (noting circuit split); W. Corbett, "Of Babies, Bath Water, and Throwing Out Proof Structures: It Is Not Time to Jettison *McDonnell Douglas*," 2 Employee Rts. & Emp. Pol'y J. 361, 387 (1998) (noting division among the circuits).

[18] *Townsend v. Lumbermens Mutual Casualty Co.*, 294 F.3d at 1234; *Watson v. Southeastern Pennsylvania Transp. Authority*, 207 F.3d at 212.

[19] *Conroy v. Abraham Chevrolet-Tampa, Inc.*, 375 F.3d at 1230; *Kozlowski v. Hampton School Bd.*, 77 Fed.Appx. at 137; *Ratliff v. City of Gainesville, Texas*, 256 F.3d at 359; *Fite v. Digital Equipment Corp.*, 232 F.3d at 5; *Smith v. Borough of*

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Act,[20] the Fair Housing Act,[21] the Fair Labor Standards Act,[22] section 1981,[23] and section 1982.[24]

This Court twice granted certiorari, in *Reeves* itself and earlier in *Hicks*, to decide whether it is permissible for a trier of fact to infer the existence of an unlawful motive from the falsity of a defendant's proffered explanation. The question presented in the instant case is fully as important as the issue which warranted review in *Reeves* and *Hicks*. Whether a jury is to be told about the inference permitted by *Reeves* is assuredly as significant as the decision in *Reeves* itself permitting a jury to actually draw that inference.

The repeated EEOC amicus briefs in support of requiring a *Reeves* inference instruction have correctly stressed the significance of this question,

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*Wilkinsburg*, 147 F.3d at 275; *Gehring v. Case Corp.*, 43 F.3d at 342.

[20] *Fite v. Digital Equipment Corp.*, 232 F.3d at 5; *Watson*, 207 F.3d at 212.

[21] *Cabrera v. Jakabovitz*, 24 F.3d at 379.

[22] *Kanida v. Gulf Coast Medical Personnel LP*, 363 F.3d at 573.

[23] *Townsend*, 294 F.3d at 1234; *Cabrera*, 24 F.3d at 379.

[24] *Cabrera*, 24 F.3d at 379.

noting "the importance of this issue to ... effective enforcement efforts."[25]

> We are concerned that, unless courts instruct juries ... that they may find that the defendant discriminated against the plaintiff if they find that defendant's stated reasons for the challenged decisions are not the true reasons, ... plaintiffs will be unfairly deprived of the benefit of an important method of proof.[26]

"[T]he instruction accurately states an important principal of proof in disparate treatment cases."[27]

Because of the current conflict on this issue, juries hearing identical discrimination claims on identical records will receive different instructions, depending on the location of the courthouse in which the trial is held. In five circuits the jury will be told that it may infer the existence of a discriminatory motive from the falsity of the defendant's explanation. In three circuits the jury will receive no such

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[25] Brief of The U.S. Equal Employment Opportunity Commission as *Amicus Curiae*, *DiJoseph v. Invivo Research, Inc.*, No. 03-13754-HH (11th Cir.), at 1.

[26] Brief of The Equal Employment Opportunity Commission as *Amicus Curiae*, *Ratliff v. City of Gainesville*, No. 99-41472 (5th Cir.), at 2; see Brief of The Equal Employment Opportunity Commission as *Amicus Curiae*, *Townsend v. Lumbermens Mutual Casualty Co.*, No. 00-3055 (10th Cir.), at 1-2 (same).

[27] Brief of The Equal Employment Opportunity Commission as *Amicus Curiae*, *Townsend v. Lumbermens Mutual Casualty Co.*, No. 00-3055 (10th Cir.), at 18.

explanation, and will be at liberty to conclude (as the Fifth Circuit mistakenly did in *Reeves*) that a plaintiff claiming discrimination must produce some other type of evidence. Because of this pivotal difference in instructions, the outcome of a trial will inevitably depend at times on the circuit in which the case is heard.

## III. THE DECISION OF THE COURT OF APPEALS IS CLEARLY INCORRECT

The courts of appeals which require the giving of a *Reeves* inference instruction have correctly focused on an intensely practical problem: in the absence of that instruction juries are likely to make the same error committed by federal lower court judges prior to *Reeves* itself, mistakenly assuming that something more than proof of the falsity of an employer's explanation is required to support an inference of discrimination.

In *Smith* the Third Circuit explained that the caselaw which permits a trier of fact to infer discrimination from the falsity of a defendant's explanation is based on an extensive body of judicial experience evaluating discrimination cases, experience which juries themselves simply would not have. Although that caselaw is grounded in the notion

> that any party's false testimony may be taken as evidence of its having fabricated its case, ... this does not mean that the jury will know without being told that its disbelief in

> the employer's proffered reason may be evidence that, coupled with evidence establishing plaintiff's prima facie case, will support a finding of intentional discrimination. While it may appear to us, looking from the perspective of our knowledge of the reported opinions that the evidentiary framework is nothing more than common sense, the jury comes to its task without that background or experience.

147 F.3d at 280. The Third Circuit correctly observed that it was unlikely that a civil jury would in a few hours of deliberations arrive at the understanding which the federal judiciary had required many years to grasp regarding the significance of the falsity of a defendant's explanation.

> In light of the decades it has taken for the courts to shape and refine the *McDonnell Douglas* standard into its present form and the inordinate amount of ink that has been spilled over the question of how a jury may use its finding of pretext, it would be disingenuous to argue that it is nothing more than a matter of common sense. Indeed, the answer to the question of whether a jury is allowed to infer discrimination from pretext eluded many of the federal courts of this country for a substantial period of time.

147 F.3d at 280-81.

The Third Circuit also explained that the traditional jury instruction about witness credibility provides a jury with insufficient guidance.

> The ... charge ... instructed the jury that it could discredit a witness's testimony if it found inconsistencies or discrepancies therein. This, however, merely instructed the jurors as to when they may disbelieve a witness. It said nothing about what the jury may do or infer once the jurors had decided to disbelieve the employer's proffered reason.

147 F.3d at 280.

The Fourth Circuit in *Kozlowski* pointed out the need for a *Reeves* inference instruction to prevent jurors from making the same mistake as had some federal judges regarding whether the falsity of a defendant's explanation would support an inference of discrimination.

> We agree with the general principle that a judge need not instruct a jury on all valid legal principles in a given case. Nonetheless, the particular inference at issue here – that if the jury disbelieves the reasons given by the employer to justify its actions, then the jury may infer discrimination – has in the past sparked considerable disagreement among the courts.... Given the amount of disagreement among judges of the federal courts of appeals over whether a jury may infer discrimination simply from their disbelief of the employer's stated justifications, it seems unlikely that jurors will uniformly intuit that such an inference is permissible.

77 Fed.Appx. at 143.

The Fifth Circuit in *Ratliff* recognized that this problem cannot be avoided merely by instructing the jury that it can rely on circumstantial evidence to find discrimination. The Fifth Circuit noted that even federal district judges in that circuit – all of whom certainly knew that circumstantial evidence is probative – had repeatedly and mistakenly concluded that the falsity of a defendant's explanation could not support an inference of discrimination. 256 F.3d at 360. The Fifth Circuit reasoned that it would be unrealistic to assume that juries, unaided by any pretext instruction, would arrive on their own at the rule in *Reeves*.

> Without a charge on pretext, the course of the jury's deliberations will depend on whether the jurors are smart enough or intuitive enough to realize that inferences of discrimination may be drawn from evidence establishing plaintiff's prima face case and the pretextual nature of the employer's proffered reasons for its actions. It does not denigrate the intelligence of our jurors to suggest that they need some instruction in the permissibility of drawing that inference.

256 F.3d at 361 n.7 (quoting *Smith*).

The Tenth Circuit as well recognizes that a *Reeves* inference instruction is necessary because of the risk that juries would make the same error that had been made by the court of appeals in *Reeves* itself, and would incorrectly assume that proof of the

falsity of an employer's explanation could not support an inference of discrimination.

> [P]erhaps most significantly, we note that the Supreme Court in *Hicks* and *Reeves* cleared away a circuit split over the so-called "pretext-plus" theory which said that a jury's rejection of an employer's proffered explanation could not, by itself, suffice to show discriminatory motive.... Even after *Hicks*, federal courts had not yet fully abandoned the "pretext-plus" theory. See *Reeves v. Sanderson Plumbing Products, Inc.*, 197 F.3d 688, 693 (5th Cir. 1999).... This is a difficult matter for courts, and would certainly be difficult for a jury. We consider the danger too great that a jury might make the same assumption that the Fifth Circuit did in *Reeves*.

294 F.3d at 1240-41. The Tenth Circuit recognized that this problem can be avoided only by an instruction from the court, not by mere argument of counsel.

> [T]he permissibility of an inference of discrimination from pretext alone is a matter of law that the Supreme Court recently clarified in *Reeves*....
>
> While counsel may be relied on to point out facts and suggest reasoning, the judge's duty to give an instruction on an applicable matter of law is clear. That is particularly true where, as here, the law goes to the heart of the matter....

> It is unreasonable, we think, to expect that jurors, aided only by the arguments of counsel, will intuitively grasp a point of law that until recently eluded federal judges who had the benefits of such arguments.

294 F.3d at 1241 n.5.

The United States Equal Employment Opportunity Commission, the federal agency with primary responsibility for enforcing Title VII, has repeatedly recognized that a plaintiff is entitled to a *Reeves* inference instruction. In four briefs filed in three different courts of appeals, the EEOC has consistently maintained that it is improper for a district court to deny the type of jury instruction requested in this case.[28]

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[28] Brief of The U.S. Equal Employment Opportunity Commission as *Amicus Curiae*, *DiJoseph v. Invivo Research, Inc.*, No. 03-13754-HH (11th Cir.) at 11-12:

> The district court committed reversible error in declining to instruct the jury that it was permitted to infer a discriminatory motive if it disbelieved Defendant's explanation.... Trial courts should instruct jurors that a plaintiff may prove discriminatory motive by means of a negative inference from the falsity of the employer's explanation.

(Capitalization omitted). Brief of The U.S. Equal Employment Opportunity Commission as *Amicus Curiae*, *Conroy v. Abraham Chevrolet-Tampa, Inc.*, No. 03-11405-GG (11th Cir.), 2003 WL 23744565 at *13:

> The district court ... committed reversible error in declining to instruct the jury that it was permitted to infer a discriminatory motive if it disbelieved [the

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Such an instruction, the EEOC maintains, "goes to the heart of Plaintiffs' method of proving discrimination."[29]

> By failing to explain to the jury that it was permitted to infer that the [defendant] acted on the basis of age if it found that the [defendant's] stated reasons ... were false, the court created a real risk that the jury would reject [the plaintiff's] claim because it erroneously believed that he was required to ... establish a discriminatory motive by affirmative evidence *in addition to* the evidence that the proffered reasons were not the real reasons....
>
> The legal point explained in plaintiff's proposed instruction ... is a simple one.

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> defendant's] explanation.... [W]ithout an appropriate instruction on "pretext," a reasonable jury could not be expected to understand that it is permitted to infer ... age discrimination based on a finding that the defendant's asserted reason was not the true reason.

Brief of The Equal Employment Opportunity Commission as *Amicus Curiae*, *Townsend v. Lumbermens Mutual Casualty Co.*, No. 00-3055 (10th Cir.) at 9:

> Trial courts should instruct jurors that a plaintiff may prove discriminatory motive by means of a negative inference from the falsity of the employer's explanation.

(Capitalization omitted). Brief of The Equal Employment Opportunity Commission as *Amicus Curiae*, *Ratliff v. City of Gainesville*, No. 99-41472 (5th Cir.) at 8 (same).

[29] Brief of The U.S. Equal Employment Opportunity Commission as *Amicus Curiae*, *DiJoseph v. Invivo Research, Inc.*, at 12.

> However, it is not intuitively obvious.... The possibility of [jury] error is demonstrated by the fact that several courts have made it. After ... *Hicks* ... a number of appellate courts interpreted [that decision] to mean that the plaintiff must produce some affirmative evidence of discriminatory motive in addition to the prima facie case and proof that the stated reasons are false.... The confusion over this point led the Supreme Court to grant certiorari in *Reeves* to clarify the precise point that [the plaintiff] asked the district court to explain to the jury.[30]

(Emphasis in original). "[W]ithout an appropriate instruction on pretext, a reasonable jury could not be expected to understand that it is permitted to infer ... discrimination based on a finding that the defendant's asserted reason was not the true reason."[31]

> In the absence of the proper instruction on "pretext/inference," there is no way to determine, from the verdict, whether the jury decided the defendant's proffered reason was credible, or whether the jury disbelieved the defendant's explanation but concluded, incorrectly, that such a disbelief was not enough to sustain [the plaintiff's] burden of proving ... discrimination.... Counsel's arguments are

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[30] Brief of The Equal Employment Opportunity Commission as *Amicus Curiae*, *Ratliff v. City of Gainesville*, at 11-13.

[31] Brief of The U.S. Equal Employment Opportunity Commission as *Amicus Curiae*, *DiJoseph v. Invivo Research, Inc.* at 11-12.

> not an adequate substitute for a complete and accurate statement of the law by the judge....[32]

The position advanced by the defendant in the courts below has been rejected by all the courts of appeals. In the district court the government emphatically objected that a requested *Reeves* pretext inference instruction would actually be improper, asserting that such an instruction would be "argumentative" and would "improperly suggest[ ] that the defendant's explanation for any adverse action must be scrutinized more closely than the plaintiff's own testimony." (Record Excerpts, at 41). In the Ninth Circuit, the Department of Justice suggested that a *Reeves* inference instruction ought not be given because counsel for the plaintiff, not the trial judge, should be responsible for explaining to the jury what inferences can (under *Reeves*) permissibly be drawn from the falsity of a defendant's explanation. Emphasizing the Ninth Circuit's "general disinclination toward permissible inference instructions," the defendant argued that "[p]ermissive inferences should be left to counsel to argue and should not become the responsibility of the trial court." (Appellees' Answering Brief at 37). Even the circuits that do not

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[32] Brief of The U.S. Equal Employment Opportunity Commission as *Amicus Curiae*, *Conroy v. Abraham Chevrolet-Tampa, Inc.*, No. 03-11405-GG (11th Cir.), 2003 WL 23744565 at *24-*25.

require the giving of a *Reeves* inference instruction agree that such an instruction is permissible.

## IV. THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR RESOLVING THE QUESTION PRESENTED

This case presents an ideal vehicle for resolving the question presented. In the district court, plaintiff made a timely and quite specific request under F.R.C.P. 51 for a *Reeves* inference instruction. The terms of the requested instruction are those required in the Second, Third, Fourth, Fifth and Tenth Circuits.

Plaintiff emphatically litigated this precise issue in the court of appeals. In a published opinion, the Ninth Circuit squarely decided the question presented, and did so in a manner which the court of appeals itself recognized was contrary to the holding of several other circuits.

In the context of this appeal, the question presented is a straightforward legal issue, unencumbered by any fact-bound case-specific considerations. In opposing the requested instruction, the defendants did not argue that there was any circumstance particular to this case which rendered that instruction inappropriate or unnecessary; rather, the government contended that a *Reeves* inference instruction would always be inappropriate. Similarly, in rejecting that proposed instruction the district judge did not rely on any facet peculiar to the instant case, but indicated

she thought such instructions were always frowned upon under Ninth Circuit precedent. Finally, the court of appeals, in affirming the rejection of the requested instruction, clearly held that a trial judge is never required to grant a request for a *Reeves* inference instruction; nothing in the Ninth Circuit opinion turned in any way on the particular facts of this case.

This is a well established, mature conflict which is ripe for resolution by this Court. Seven circuits, encompassing a large majority of all the judicial districts in the United States, have now addressed the question presented. The underlying legal and practical issues have been fully aired by the lower courts, whose decisions reflect a body of experience which can inform this Court's decision.

## CONCLUSION

For the above reasons, this Court should issue a writ of certiorari to review the judgment and opinion of the court of appeals.

Respectfully submitted,

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FOR PUBLICATION

# UNITED STATES COURT OF APPEALS
# NINTH CIRCUIT

HENRIETTA BROWNING,

*Plaintiff-Appellant,*

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF TREASURY; UNITED STATES INTERNAL REVENUE SERVICE; HENRY M. PAULSON, JR.,* Secretary of the Department of the Treasury,

*Defendants-Appellees.*

No. 07-35557

D.C. No. CV-05-01471-BR

OPINION

Appeal from the United States District Court
for the District of Oregon
Anna J. Brown, District Judge, Presiding

Argued and Submitted
March 3, 2009 – Portland, Oregon

Filed May 22, 2009

Before: Susan P. Graber, Raymond C. Fisher and Milan D. Smith, Jr., Circuit Judges.

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* Henry M. Paulson, Jr. is substituted for his predecessor, John W. Snow, as Secretary General of the United States, pursuant to Fed. R. App. P. 43(c)(2).

## COUNSEL

Beth Creighton (argued), Zan Tewksbury, Steenson, Schumann, Tewksbury, Creighton & Rose, Portland, Oregon, for the plaintiff-appellant.

Karin J. Immergut, United States Attorney, Kelly A. Zusman (argued), Assistant United States Attorney, Portland, Oregon, for the defendants-appellees.

## OPINION

FISHER, Circuit Judge:

We address the issue of whether a district court's refusal to give a permissive jury instruction regarding pretext in an employment discrimination case is reversible error.[1] We reaffirm that so long as the jury instructions set forth the essential elements that the plaintiff must prove, a district court does not abuse its discretion in declining to give an instruction explicitly addressing pretext.

### I.

Henrietta Browning has worked at an Internal Revenue Service call center in Portland, Oregon,

[1] Browning also appeals several evidentiary rulings, which we address in a concurrently filed memorandum disposition.

since 1989. In 1998, she was temporarily promoted to the position of team leader, assuming responsibility for the supervision of a group of employees. The following year, incoming operations manager Gloria Candanoza made Browning's promotion permanent. After Browning transferred from the night shift to the day shift in 2002, she was supervised by department manager Art Ayotte.

As a team leader, Browning was required to monitor a certain number of the calls performed by each employee on her team each month, write a detailed critique of the call and enter the review into a computerized database. Team leaders were also each assigned responsibility for an "application" (a distinct area of tax law) and expected to similarly monitor employees' performance regarding that application. In 2003, Ayotte's performance evaluation for Browning rated her as not having met expectations because she had failed to complete the required number of phone reviews, and Browning was placed on a 60-day performance improvement plan ("PIP") to address her shortcomings. Browning met with Ayotte weekly during the course of her PIP and believed she was on pace to satisfactorily complete the PIP requirements. At the end of her PIP, however, Ayotte concluded that Browning still had not completed the required number of phone reviews for employees within her application or submitted requisite employee security reviews, and recommended that Browning be demoted. Browning contested the demotion, but – although a labor relations specialist agreed a

miscommunication was responsible for Browning's failure to complete one element of her PIP requirements – the rest of her objections were found not to be valid and Browning was demoted. Browning was re-assigned to her former position as a taxpayer service specialist.

II.

In November 2003, Browning filed a complaint with the Equal Employment Office alleging racial discrimination and retaliation for a prior EEO complaint that Browning had brought against another supervisor. After the EEO investigation found no discrimination had occurred, Browning filed this lawsuit in federal district court alleging racial discrimination and retaliation. At the close of trial, Browning requested that the following instruction be given to the jury:

> Consistent with the general principle of law that a party's dishonesty about a material fact may be considered as affirmative evidence of guilt, if you find that the defendants' explanation about why they took adverse action against a plaintiff is not worthy of belief, you may infer a discriminatory or retaliatory motive from that fact.

She based her proposed instruction on a passage in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000), which held:

> In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt."

The district court refused to give the requested instruction. Browning now appeals, arguing that the refusal to give a permissive pretext instruction was reversible error. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

## III.

Jury instructions are reviewed for an abuse of discretion. *See Thorsted v. Kelly*, 858 F.2d 571, 573 (9th Cir. 1988). We consider the jury instructions as a whole and evaluate whether they were misleading or inadequate, *see Guebara v. Allstate Ins. Co.*, 237 F.3d 987, 992 (9th Cir. 2001), and whether any error was harmless, *see Swinton v. Potomac Corp.*, 270 F.3d 794, 805 (9th Cir. 2001).

**[1]** In *Cassino v. Reichhold Chemicals, Inc.*, 817 F.2d 1338 (9th Cir. 1987), we held that refusal to give a permissive pretext jury instruction was not reversible error. Cassino sued his employer, Reichhold Chemicals, for age discrimination. Reichhold requested the following instruction: "So long as Reichhold states a legitimate reason for the discharge of

Mr. Cassino, Mr. Cassino has the burden of proving that his age was a determining factor in Reichhold's decision and that Reichhold's stated reason was merely a pretext for discrimination." *Id.* at 1344. The district court refused and gave only the following instructions:

> 1. [Cassino] belongs to a protected group.
>
> 2. He was the subject of age discrimination, and but for his age, he would not have been terminated by [Reichhold].
>
> 3. [Reichhold] intentionally discriminated against [Cassino] because of his age.
>
> 4. That as a direct proximate result of such age discrimination, [Cassino] sustained damages.

*Id.* The jury found in favor of Cassino. *See id.* at 1342. We held that the refusal to give Reichhold's proposed instruction was appropriate:

> The jury was instructed that it was Cassino's burden to prove that he would not have been fired "but for his age." Because the instructions reviewed as a whole set forth the essential elements that Cassino had to prove in order to prevail, the court did not err in refusing to give Reichhold's proposed pretext instructions.

*Id.* at 1345; *see also Merrick v. Farmers Ins. Group*, 892 F.2d 1434, 1441 (9th Cir. 1990) (holding two jury instructions that "read together clearly state that the existence of a legitimate basis for terminating [an

employee] would not save [the employer] if the retaliatory motive was the 'but for' cause of his discharge" were "an adequate statement of the law as it applies to pretext cases" and did not require separate pretext instruction).

**[2]** In the years since *Cassino*, a circuit split has emerged on the question of permissive pretext instructions.[2] Analysis of discrimination claims has also evolved since *Cassino* was decided in 1987. We see no reason, however, to depart from *Cassino*'s basic holding that if the jury instructions set forth the essential elements the plaintiff needs to prove, the district court's refusal to give an instruction explicitly addressing pretext is not reversible error.

Here, the district court gave the following instructions regarding the reasons the IRS demoted Browning:

> In the plaintiff's first claim, she contends that her race was a motivating factor in the defendants' allegedly discriminatory conduct towards her. In her second claim,

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[2] *Compare Townsend v. Lumbermens Mut. Cas. Co.*, 294 F.3d 1232 (10th Cir. 2002), *and Ratliff v. City of Gainesville*, 256 F.3d 355 (5th Cir. 2001), *and Smith v. Borough of Wilkinsburg*, 147 F.3d 272 (3d Cir. 1998), *and Cabrera v. Jakabovitz*, 24 F.3d 372 (2d Cir. 1994), *with Conroy v. Abraham Chevrolet-Tampa, Inc.*, 375 F.3d 1228 (11th Cir. 2004) (holding permissive pretext instruction is not required), *and Moore v. Robertson Fire Prot. Dist.*, 249 F.3d 786 (8th Cir. 2001), *and Fite v. Digital Equip. Corp.*, 232 F.3d 3 (1st Cir. 2000), *and Gehring v. Case Corp.*, 43 F.3d 340 (7th Cir. 1994).

> she contends the fact that she complained about discrimination in the workplace was a motivating factor in the defendants' allegedly retaliatory conduct toward her.
>
> . . .
>
> Now, in order to prevail on her first claim for race discrimination, the plaintiff must prove the defendants took certain actions against her and that the plaintiff's race was a motivating factor in the defendants taking the action.
>
> In particular, the plaintiff must prove . . . that her race was a motivating factor in the defendants' conduct.
>
> . . . .
>
> In order to prevail on her second claim for retaliation, the plaintiff must prove the defendants took certain actions against her because she complained about race discrimination in the workplace. In particular, the plaintiff must prove . . . that her protected activity was a motivating factor in the defendants' conduct.

The district court defined "motivating factor" as "a factor that played a role in the decisions" of Candanoza or Ayotte. The court also instructed the jury that it should "weigh and evaluate the testimony and the credibility of each witness" and that it should consider both direct and circumstantial evidence (after explaining both concepts). The court told Browning that, although it would not give her

requested pretext instruction, she was free to explain to the jurors that they could find the IRS's reasons for demoting her to be pretextual and infer an unlawful motive. Specifically, the court said:

> I'm mindful of Ninth Circuit authority that cautions trial judges against giving any kind of inference instruction, and I'm mindful of the risk that an inference instruction can be seen as potentially a comment on the evidence; and so I'm not inclined to give any permissive inference instruction and instead to permit counsel full latitude to argue inferences, based on a circumstantial evidence instruction.

Apparently in response to the court's offer, Browning subsequently argued to the jury that "if you don't believe the IRS witnesses, then you have the right to find for Ms. Browning." Although cursory, Browning's argument advised the jury that if it did not believe the IRS's justifications for Browning's demotion, it could find in her favor.

**[3]** In sum, the district court's jury instructions "set forth the essential elements that [Browning] had to prove in order to prevail," and Browning was free to explain those elements to the jury in order to make clear that finding the IRS's proffered reasons for Browning's demotion pretextual could justify the jury finding the IRS had discriminated against Browning. *Cassino,* 817 F.2d at 1345; *cf. Conroy v. Abraham Chevrolet-Tampa, Inc.,* 375 F.3d 1228, 1235 (11th Cir. 2004) ("The charge to the jury gave instructions on

drawing inferences from the evidence and weighing the credibility of witnesses. This was sufficient to allow the jury to find discrimination or retaliation so long as they disbelieved Abraham Chevrolet's explanation for Conroy's termination. We also find it significant that Conroy's counsel made good use of his opportunity to argue pretext to the jury in closing statements. . . ."). The district court did not abuse its discretion in rejecting Browning's more explicit pretext instruction.

**AFFIRMED.**

**UNITED STATES DISTRICT COURT**
**DISTRICT OF OREGON**

**HENRIETTA BROWNING,**
Plaintiff,

v.

**UNITED STATES INTERNAL REVENUE SERVICE,** et al.,

Defendants.

Civil No. 05-1471-BR

**JUDGMENT**

(Filed May 2, 2007)

Based on the jury verdict rendered on April 27, 2007, IT IS HEREBY ORDERED that judgment is entered in favor of the Defendants.

Dated this 2nd day of May, 2007.

/s/ Anna J. Brown
Anna J. Brown
United States District Court Judge

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HENRIETTA BROWNING,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF TREASURY; UNITED STATES INTERNAL REVENUE SERVICE; TIMOTHY F. GEITHNER,** Secretary of the Department of the Treasury,

Defendants-Appellees.

No. 07-35557

D.C. No. CV-05-01471-BR

AMENDED MEMORANDUM*

(Filed Jun. 16, 2009)

Appeal from the United States District Court
for the District of Oregon
Anna J. Brown, District Judge, Presiding

Argued and Submitted March 3, 2009
Portland, Oregon

Before: GRABER, FISHER and M. SMITH, Circuit Judges.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** Timothy F. Geithner is substituted for his predecessor, Henry M. Paulson, Jr., as Secretary of the Treasury, pursuant to Fed. R. App. P. 43(c)(2).

Henrietta Browning appeals the district court's rulings limiting the evidence she was allowed to present in her racial discrimination claim against the government.[1] We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

The district court appropriately exercised its considerable discretion in excluding testimony that the court reasonably found could have allocated trial time inefficiently. *See Tennison v. Circus Circus Enters., Inc.*, 244 F.3d 684, 688, 690 (9th Cir. 2001). Furthermore, Browning has not shown that the alleged error "more probably than not" tainted the jury's verdict, because much of the testimony that Browning contends was inappropriately excluded was actually presented at trial. *Id.* at 688.

**AFFIRMED.**

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[1] Browning also appeals the district court's refusal to give a permissive jury instruction regarding pretext, which we address in a concurrently filed published opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

| | |
|---|---|
| HENRIETTA BROWNING,<br>Plaintiff,<br>vs.<br>UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF TREASURY; UNITED STATES INTERNAL REVENUE SERVICE; JOHN W. SNOW, Secretary of the Department of the Treasury,<br>Defendants. | No. CV-05-1471-BR<br>April 27, 2007<br>Portland, Oregon |

**TRIAL – DAY 4**

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE ANNA J. BROWN
UNITED STATES DISTRICT COURT JUDGE

[585] PROCEEDINGS

(The Court, counsel, and the parties reconvene.)

THE COURT: All right. So we are back on the record in the case of Henrietta Browning versus the United States and others.

I want the record to reflect that last night, after the proceedings on the record, counsel met with me for about an hour to review requested jury instructions and the proposed instructions that I gave them.

We ended the conference with counsel taking home a draft of the instructions and verdict form, which was in the form that I intended to proceed with this morning, except for any additional changes, suggestions, or arguments counsel wanted to bring to my attention.

I want to note that as of last night, I had concluded I would not be giving any of the plaintiff's requested instructions seeking the Court instructing the jury regarding potential inferences the jury could draw from the evidence in particular. These were identified as plaintiff's requested Jury Instruction Nos. 1, 2, and 3. It was my conclusion that these are simply instructions that really are subsets of the circumstantial evidence instruction.

I am mindful of Ninth Circuit authority that cautions trial judges against giving any kind of [586] inference instruction, and I'm mindful of the risk that an inference instruction can be seen as potentially a comment on the evidence; and so I'm not inclined to give any permissive inference instruction and instead to permit counsel full latitude to argue inferences, based on a circumstantial evidence instruction.

* * *

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**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | |
|---|---|
| HENRIETTA BROWNING,<br>Plaintiff-Appellant,<br>v.<br>UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF TREASURY; UNITED STATES INTERNAL REVENUE SERVICE; TIMOTHY F. GEITHNER,* Secretary of the Department of the Treasury,<br>Defendants-Appellees. | No. 07-35557<br>D.C. No. CV-05-01471-BR<br>ORDER<br>(Filed Aug. 12, 2009) |

Before: GRABER, FISHER and M. SMITH, Circuit Judges.

The panel judges have voted to deny Appellant's petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35

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* Timothy F. Geithner is substituted for his predecessor, Henry M. Paulson, Jr., as Secretary of the Treasury, pursuant to Fed. R. App. P. 43(c)(2).

Appellant's petition for rehearing en banc, filed July 2, 2009 is **DENIED**.

---

Supreme Court
MAR 15 2010

No. 09-583

# In the Supreme Court of the United States

HENRIETTA BROWNING, PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE SECRETARY OF THE TREASURY IN OPPOSITION

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## QUESTION PRESENTED

Whether it is *per se* reversible error for a trial court in a discrimination case to decline to give a permissive inference instruction on pretext—*i.e.*, to inform the jury that it may infer that defendants' motives were discriminatory if it finds defendants' explanation of its actions not to be credible—regardless of whether such an instruction is justified by the evidence or whether the absence of such an instruction causes prejudice to the plaintiff.

## TABLE OF CONTENTS


Page

Opinion below ..... 1
Jurisdiction ..... 1
Statement ..... 2
Argument ..... 5
Conclusion ..... 12


## TABLE OF AUTHORITIES

Cases:


*Cabrera* v. *Jakabovitz*, 24 F.3d 372 (2d Cir.), cert. denied, 513 U.S. 876 (1994) ..... 7

*Cassino* v. *Reichhold Chems., Inc.*, 817 F.2d 1338 (9th Cir. 1987), cert. denied. 484 U.S. 1047 (1988) ..... 5

*Conroy* v. *Abraham Chevrolet-Tampa, Inc.*, 375 F.3d 1228 (11th Cir.), cert. denied, 543 U.S. 1035 (2004) ..... 7, 11

*Fite* v. *Digital Equip. Corp.*, 232 F.3d 3 (1st Cir. 2000) ... 7

*Gehring* v. *Case Corp.*, 43 F.3d 340 (7th Cir. 1994), cert. denied, 515 U.S. 1159 (1995) ..... 7, 11

*Gibson* v. *Lockheed Aircraft Serv., Inc.*, 350 U.S. 356 (1956) ..... 6

*Kanida* v. *Gulf Coast Med. Pers. LP*, 363 F.3d 568 (5th Cir. 2004) ..... 6, 7, 10

*Kozlowski* v. *Hampton Sch. Bd.*, 77 Fed. Appx. 133 (4th Cir. 2003) ..... 7, 8, 10

*McDonough Power Equip., Inc.* v. *Greenwood*, 464 U.S. 548 (1984) ..... 10

*Moore* v. *Robertson Fire Prot. Dist.*, 249 F.3d 786 (8th Cir. 2001) ..... 7, 8, 11

Cases—Continued: Page

*Ratliff* v. *City of Gainesville*, 256 F.3d 355 (5th Cir. 2001) ..... 10

*Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000) ..... 4, 5, 6, 8, 9

*Rubinstein* v. *Administrators of the Tulane Educ. Fund*, 218 F.3d 392 (5th Cir. 2000), cert. denied, 532 U.S. 937 (2001) ..... 10

*Smith* v. *Borough of Wilkinsburg*, 147 F.3d 272 (3d Cir. 1998) ..... 7

*Townsend* v. *Lumbermens Mut. Cas. Co.*, 294 F.3d 1232 (10th Cir. 2002) ..... 7, 8, 10

*Williams* v. *Eau Claire Pub. Schs.*, 397 F.3d 441 (6th Cir.), cert. denied, 546 U.S. 836 (2005) ..... 7

Statutes:

28 U.S.C. 2111 ..... 10

42 U.S.C. 2000e-16(c) ..... 1

Miscellaneous:

Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil* (3d ed. 2008) ..... 8

# In the Supreme Court of the United States

No. 09-583

HENRIETTA BROWNING, PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE SECRETARY OF THE TREASURY IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 567 F.3d 1038.

### JURISDICTION

The judgment of the court of appeals was entered on May 22, 2009. A petition for rehearing was denied on August 12, 2009 (Pet. App. 16a-17a). The petition for a writ of certiorari was filed on November 10, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

[1] Although petitioner styles her petition as an action against the United States, *et al.*, the only proper party in this Title VII action is the Secretary of the Treasury. See 42 U.S.C. 2000e-16(c). See also note 3, *infra*.

## STATEMENT

Petitioner began working at an Internal Revenue Service (IRS) call center in Portland, Oregon in 1989. Pet. App. 2a-3a. In 1998, she was temporarily promoted to the position of team leader; the following year, petitioner's promotion was made permanent. *Id.* at 3a. Art Ayotte became petitioner's supervisor in 2002 when petitioner transferred as a team leader from the night shift to the day shift. *Ibid.* In that job, petitioner was required to monitor a certain number of the calls made by each employee on her team each month, write a detailed critique of each call, and enter the review into a computerized database. *Ibid.* Each team leader was also responsible for a distinct area of tax law and was expected to monitor employees' performance regarding that subject matter. *Ibid.*

In 2003, Ayotte evaluated petitioner's performance and rated her as not having met expectations because she had failed to complete the required number of phone reviews. Pet. App. 3a. Petitioner was placed on a 60-day performance improvement plan (PIP) to address her shortcomings, and she met with Ayotte weekly during those 60 days. *Ibid.* At the conclusion of petitioner's PIP, Ayotte concluded that she still had not completed the required number of phone reviews for employees or submitted the requisite employee security reviews; Ayotte therefore recommended that petitioner be demoted. *Ibid.* Petitioner contested her demotion, but, with the exception of one specification,[2] petitioner's challenge was rejected by the agency. *Id.* at 3a-4a. In 2004,

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[2] A labor relations specialist agreed that a miscommunication was responsible for petitioner's failure to complete one element of her PIP. Pet. App. 3a-4a.

she was demoted and reassigned to her former position as a taxpayer service specialist. *Ibid.*

In November 2003, after receiving her evaluation, petitioner filed a complaint with the Equal Employment Opportunity (EEO) Office. Her complaint alleged discrimination on the basis of race and retaliation for a prior EEO complaint petitioner had filed against a different supervisor. Pet. App. 4a. The EEO investigation concluded that no discrimination had occurred. *Ibid.*

2. Petitioner then filed this action, alleging race discrimination and retaliation. Pet. App. 4a.[3] At the conclusion of the jury trial, the judge instructed the jury as follows:

> [I]n order to prevail on her first claim for race discrimination, the plaintiff must prove the defendants took certain actions against her and that the plaintiff's race was a motivating factor in the defendants taking the action.
>
> In particular, the plaintiff must prove . . . that her race was a motivating factor in the defendants' conduct. * * *
>
> In order to prevail on her second claim for retaliation, the plaintiff must prove the defendants took certain actions against her because she complained about race discrimination in the workplace. In particular, the plaintiff must prove . . . that her pro-

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[3] The complaint named as defendants: (1) the United States of America, (2) the Department of the Treasury, (3) the Internal Revenue Service, and (4) John W. Snow, the then-Secretary of the Department of the Treasury. In a Title VII action, only the head of the agency is the proper defendant. See note 1, *supra*.

> tected activity was a motivating factor in the defendants' conduct.

*Id.* at 7a-8a. The district court defined a "motivating factor" as "a factor that played a role in the decisions" of petitioner's supervisor. *Id.* at 8a. The court also instructed the jury both that it should "weigh and evaluate the testimony and the credibility of each witness," and that it should consider direct and circumstantial evidence (after explaining both concepts). *Ibid.*

Petitioner asked that the following additional instruction be given to the jury, based on this Court's decision in *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000):

> Consistent with the general principle of law that a party's dishonesty about a material fact may be considered as affirmative evidence of guilt, if you find that the defendants' explanation about why they took adverse action against a plaintiff is not worthy of belief, you may infer a discriminatory or retaliatory motive from that fact.

Pet. App. 4a. The district court declined to give petitioner's requested instruction, explaining that it was "mindful of Ninth Circuit authority that cautions trial judges against giving any kind of inference instruction" as well as of "the risk that an inference instruction can be seen as potentially a comment on the evidence." *Id.* at 3a. However, the court expressly allowed "counsel full latitude to argue inferences, based on a circumstantial evidence instruction." *Ibid.* Thereafter, without contradiction from the court or defense counsel, petitioner's counsel argued to the jury: "if you don't believe the IRS witnesses, then you have the right to find for

[petitioner]." *Ibid.* The jury ultimately found for the defendants. *Id.* at 11a.

3. Petitioner appealed, arguing that the district court's refusal to give her requested "permissive inference instruction" was reversible error.[4] The court of appeals affirmed. Pet. App. 1a-10a. The court recognized this Court's holding in *Reeves* that, in "appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." *Id.* at 5a (quoting *Reeves*, 530 U.S. at 147). Reviewing the jury instructions as a whole under an abuse of discretion standard, the court of appeals found no reversible error because the instructions "'set forth the essential elements that [petitioner] had to prove in order to prevail,' and [petitioner] was free to explain those elements to the jury in order to make clear that finding the IRS's proffered reasons for [petitioner's] demotion pretextual could justify the jury['s] finding the IRS had discriminated against [her]." *Id.* at 9a (quoting *Cassino* v. *Reichhold Chems., Inc.*, 817 F.2d 1338, 1345 (9th Cir. 1987), cert. denied, 484 U.S. 1047 (1988)). The court also noted that petitioner did in fact set forth her pretext argument before the jury—albeit in a cursory fashion—arguing "if you don't believe the IRS witnesses, then you have the right to find for [petitioner]." *Ibid.*

## ARGUMENT

Petitioner asks this Court to resolve a conflict among the courts of appeals about whether a plaintiff alleging

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[4] In her appeal, petitioner also made other arguments, which were disposed of in a separate unpublished opinion affirming the district court's judgment. See Pet. App. 12a-13a. Petitioner did not reassert those arguments in her petition for a writ of certiorari.

discrimination is always entitled to a jury instruction regarding the inference jurors may make if they believe that the defendant's proffered reason for the action in question was pretextual. Further review of this case is not warranted, however, because (1) petitioner's proposed instruction was not a complete and correct statement of the law; (2) petitioner has not argued that the evidentiary predicate existed to enable her jury to draw an inference of discrimination from a finding of pretext; and (3) petitioner does not even attempt to establish that she suffered prejudice as a result of any error the district court may have committed.

1. Petitioner is correct that this Court held in *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147-148 (2000), that it is permissible for a jury to find intentional discrimination when a plaintiff establishes a prima facie case of discrimination and the jury does not believe the defendant's proffered justification for the action in question. But the decision in *Reeves* addressed substantive issues of proof, not jury instructions. And this Court has never held that a district court must instruct a jury about every legal nuance implicated in a case as long as the instructions it does give are complete and correct. Cf. *Gibson* v. *Lockheed Aircraft Serv., Inc.*, 350 U.S. 356, 357 (1956) (per curiam).

Although the courts of appeals are divided about whether it is error for a district court to decline to issue an inference instruction regarding pretext when a plaintiff requests one,[5] the courts do agree about what such

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[5] The Second, Third, Fourth, Fifth, and Tenth Circuits have found that a district court should give a permissive inference instruction where sufficient evidence has been presented to raise a likelihood that the jury will disbelieve the nondiscriminatory justification offered by a defendant. *Kanida* v. *Gulf Coast Med. Pers. LP*, 363 F.3d 568, 573-577

an instruction should say if given. A proper inference instruction should inform the jury that it is permitted, *but not required*, to infer discrimination or retaliation if it disbelieves a defendant's proffered justification for taking the action in question. See *Williams* v. *Eau Claire Pub. Schs.*, 397 F.3d 441, 445-446 (6th Cir.), cert. denied, 546 U.S. 836 (2005); *Conroy* v. *Abraham Chevrolet-Tampa, Inc.*, 375 F.3d 1228, 1228, 1235 (11th Cir.), cert. denied, 543 U.S. 1035 (2004); *Kanida* v. *Gulf Coast Med. Pers. LP*, 363 F.3d 568, 576 (5th Cir. 2004); *Kozlowski* v. *Hampton Sch. Bd.*, 77 Fed. Appx. 133, 144 (4th Cir. 2003); *Townsend* v. *Lumbermens Mut. Cas. Co.*, 294 F.3d 1232, 1241 (10th Cir. 2002); *Smith* v. *Borough of Wilkinsburg*, 147 F.3d 272, 278 (3d Cir. 1998); *Gehring* v. *Case Corp.*, 43 F.3d 340, 343 (7th Cir. 1994), cert. denied, 515 U.S. 1159 (1995); *Cabrera* v. *Jakabovitz*, 24 F.3d 372, 382 (2d Cir.), cert. denied, 513 U.S. 876 (1994). However, in this case petitioner did not request such an instruction. Instead, she asked the court to instruct the jury only that it may draw such an inference—leaving

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(5th Cir. 2004); *Kozlowski* v. *Hampton Sch. Bd.*, 77 Fed. Appx. 133, 142-145 (4th Cir. 2003); *Townsend* v. *Lumbermens Mut. Cas. Co.*, 294 F.3d 1232, 1241 (10th Cir. 2002); *Smith* v. *Borough of Wilkinsburg*, 147 F.3d 272, 278-281 (3d Cir. 1998); *Cabrera* v. *Jakabovitz*, 24 F.3d 372, 382-383 (2d Cir.), cert. denied, 513 U.S. 876 (1994). In contrast, in addition to the Ninth Circuit below, Pet. App. 9a-10a, the First, Sixth, Seventh, Eighth, and Eleventh Circuits have found that it is not error for a district court to decline to include such an instruction. *Williams* v. *Eau Claire Pub. Schs.*, 397 F.3d 441, 445-446 (6th Cir.), cert. denied, 546 U.S. 836 (2005); *Conroy* v. *Abraham Chevrolet-Tampa, Inc.*, 375 F.3d 1228, 1233 (11th Cir.), cert. denied, 543 U.S. 1035 (2004); *Moore* v. *Robertson Fire Prot. Dist.*, 249 F.3d 786, 789-790 (8th Cir. 2001); *Fite* v. *Digital Equip. Corp.*, 232 F.3d 3, 7 (1st Cir. 2000); *Gehring* v. *Case Corp.*, 43 F.3d 340, 343 (7th Cir. 1994), cert. denied, 515 U.S. 1159 (1995).

out altogether the language about jurors' not being "required" to draw such an inference. See Pet. App. 4a ("[I[f you find that the defendants' explanation about why they took adverse action against a plaintiff is not worthy of belief, you may infer a discriminatory or retaliatory motive from that fact."). It is not an abuse of discretion for a district court to decline to include such a one-sided instruction. See 9C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil* § 2552, at 22-27 (3d ed. 2008).

2. In any case, even if petitioner had requested a properly worded inference instruction, the courts of appeals are apparently in full agreement that such an instruction is appropriate only when the plaintiff has established a prima facie case and there is a sufficient evidentiary basis for a jury to disbelieve the defendant's nondiscriminatory justification. See *Kozlowski*, 77 Fed. Appx. at 144 (district courts should give inference instruction "when the evidence presented at trial creates some likelihood that the jury might disbelieve the legitimate non-discriminatory reasons given by the employer to justify its actions"); *Townsend*, 294 F.3d at 1241 ("We do not hold that a pretext instruction is always required, but rather that it is required where, as here, a rational finder of fact could reasonably find the defendant's explanation false and could 'infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose.'") (quoting *Reeves*, 530 U.S. at 147); *Moore* v. *Robertson Fire Prot. Dist.*, 249 F.3d 786, 789-790 (8th Cir. 2001) (finding no abuse of discretion in declining to include inference instruction where the plaintiff "introduced scant evidence of pretext"). Indeed, the *Reeves* decision itself noted that a trier of fact could "infer from the falsity of the explanation that

the employer is dissembling to cover up a discriminatory purpose" only "[i]n appropriate circumstances." 530 U.S. at 147.

Petitioner makes no effort before this Court to argue that there was a sufficient evidentiary predicate to justify the district court's including an inference instruction. Indeed, she cites no evidence of pretext whatsoever in her petition for a writ of certiorari, and does not even assert that a reasonable factfinder could have found that Ayotte's proffered justification for her demotion—her poor performance—was a pretext for racial discrimination or retaliation. On the contrary, Ayotte consistently stated that he admonished petitioner for her poor performance and ultimately recommended her reduction in grade because she failed to complete her work in a timely fashion and failed to respond to his inquiries. C.A. Supp. E.R. (SER) 342-343, 346-350, 401; see also SER 408-409, 570 (testimony and video deposition of labor relations specialist Phia Williams). He explained that, for Fiscal Year 2003, petitioner did not complete several of the required paper, security, and schedule reviews. SER 393-394. Moreover, although he agreed that petitioner did complete her phone monitoring requirements in that fiscal year, he testified that she did so only after repeated reminders from him. SER 393. In the court of appeals (though not in her petition for a writ of certiorari), petitioner argued that the jury had a reasonable basis to disbelieve Ayotte's testimony because the non-supervisory quality-assurance worker assigned to assist petitioner in cleaning up her computer and organizing her files found that petitioner was responsive to his own suggestions. See Pet. C.A. Br. 46. But the fact that petitioner may have been responsive to a co-worker's suggestions does not raise an inference

that Ayotte was dishonest in claiming that petitioner was not responsive to his. Nor does such evidence call into question the Ayotte's testimony that petitioner failed to complete various job requirements. Ayotte's concerns regarding petitioner's performance were well documented and thoroughly reviewed, see SER 316, 346-359, 566, and confirmed by labor relations specialist Phia Williams, see SER 408-409. See generally Gov't. C.A. Br. 10-12.

3. Finally, even if it were error for the district court to decline petitioner's proposed instruction, such an error would warrant reversal of the jury's verdict only if the error "affect[ed]" petitioner's "substantial rights." 28 U.S.C. 2111; *McDonough Power Equip., Inc.* v. *Greenwood*, 464 U.S. 548, 553-554 (1984). Even courts of appeals that have held that it is error for a district court to decline to give an inference instruction when warranted by the evidence have held that such an error is subject to harmless error review. See *Kozlowski*, 77 Fed. Appx. at 144; *Townsend*, 294 F.3d at 1241-1242; *Ratliff* v. *City of Gainesville*, 256 F.3d 355, 359 (5th Cir. 2001) ("Even if an instruction erroneously states the applicable law or provides insufficient guidance, this Court will not disturb the judgment unless the error could have affected the outcome of the trial.") (quoting *Rubinstein* v. *Administrators of the Tulane Educ. Fund*, 218 F.3d 392, 404 (5th Cir. 2000), cert. denied, 532 U.S. 937 (2001); see also *Kanida*, 363 F.3d at 578-579 (error in declining to give inference instruction was not reversible error because plaintiff was "not seriously impaired in presenting her claim").

Petitioner makes no effort in her petition for a writ of certiorari to establish that the district court's failure to include an inference instruction affected her substan-

tial rights. Nor could she. As discussed at pp. 8-10, *supra*, petitioner did not establish an evidentiary predicate that would have justified the instruction she requested. In addition, the district court properly instructed the jury about the elements petitioner was required to demonstrate to prove discrimination or retaliation. SER 452-456. The court also instructed the jury that it should consider "indirect evidence[,] that is the proof of one or more facts from which you could find another fact." SER 451-452. Finally, the district court expressly informed petitioner's counsel that he could argue to the jury that it could infer discrimination if it disbelieved the IRS's proffered justification for petitioner's demotion, and petitioner's counsel did so, arguing that the jury had "the right to find for" petitioner if it didn't believe the IRS's witnesses. See Pet. App. 9a. Courts have consistently found that the ability of a plaintiff's attorney to argue to the jury about the inferences it may draw if it disbelieves the defendant's proffered justification mitigates any prejudice a plaintiff might suffer from a court's declining to give an inference instruction. See *Kanida*, 363 F.3d at 579 (petitioner was free to argue "that the jury should infer actual discrimination based upon the evidence she presented in [the] case showing pretext on the part of" the defendant); see also *Conroy*, 375 F.3d at 1235 (noting that plaintiff's counsel "made good use of his opportunity to argue pretext to the jury in closing statements"); *Moore*, 249 F.3d at 791 ("[A]lthough the District Court elected not to submit a pretext instruction, it in no way prevented [plaintiff] from presenting his pretext arguments to the jury. * * * Therefore, even if there were instructional error, [plaintiff] incurred no prejudice."); *Gehring*, 43 F.3d at 343 ("Many an inference is permissible. Rather than de-

scribing each, the judge may and usually should leave the subject to the argument of counsel.").

Petitioner's counsel was permitted just such an opportunity, and made use of it. Petitioner cannot identify any possibility that the verdict in her case might have come out in her favor if the district court had included either the instruction she requested or a properly worded inference instruction.

Because petitioner cannot show that she suffered prejudice as a result of the district court's declining to give her requested inference instruction, the outcome of her case would not be affected by this Court's resolution of the disagreement among the courts of appeals, even if this Court were to resolve that disagreement in the manner petitioner suggests. This case does not, therefore, warrant further review.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2010

# REPLY BRIEF

Supreme Court, U.S.
FILED
NOV 30 2009
OFFICE OF THE CLERK

No. 09-583

In The
# Supreme Court of the United States

HENRIETTA BROWNING,

*Petitioner,*

v.

UNITED STATES OF AMERICA, *et al.*,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

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TABLE OF CONTENTS

Page

THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR RESOLVING THE QUESTION PRESENTED ..... 1

CONCLUSION ..... 14

## TABLE OF AUTHORITIES

Page

CASES:

*Carter v. Kentucky*, 450 U.S. 288 (1981) ..... 9

*Conroy v. Abraham Chevrolet-Tampa, Inc.*, 375 F.3d 1228 (11th Cir. 2004) ..... 3

*Gehring v. Case Corp.*, 43 F.3d 340 (7th Cir. 1994) ..... 2, 3, 9

*Ratliff v. City of Gainesville*, 256 F.3d 355 (5th Cir. 2001) ..... 2, 3, 8

*Smith v. Borough of Wilkinsburg*, 147 F.3d 272 (3d Cir. 1998) ..... 2

*Starr v. United States*, 153 U.S. 614 (1894) ..... 10

*Taylor v. Kentucky*, 436 U.S. 478 (1978) ..... 9

*Townsend v. Lumbermens Mut. Cas. Co.*, 294 F.3d 1232 (10th Cir. 2002) ..... 8

BRIEFS:

Appellees' Answering Brief, *Browning v. United States of America*, No. 07-35557 (9th Cir.) ..... 7

Brief of Appellant, *Smith v. Borough of Wilkinsburg*, No. 97-3133 (3d Cir.) ..... 2

Initial Brief of Plaintiff-Appellant, *Conroy v. Abraham Chevrolet-Tampa, Inc.*, No. 03-11405-GG (11th Cir.) ..... 3

TABLE OF AUTHORITIES – Continued

Page

Brief of the U.S. Equal Employment Opportunity Commission as *Amicus Curiae, Conroy v. Abraham Chevrolet-Tampa, Inc.*, No. 03-11405-GG (11th Cir.) ..... 6, 7

Brief of the Equal Employment Opportunity Commission as *Amicus Curiae, Ratliff v. City of Gainesville*, No. 99-41472 (5th Cir.) ..... 3

OTHER AUTHORITIES:

Model Jury Instruction (Criminal) 4.3 ..... 5

Model Jury Instruction (Criminal) 4.6 ..... 5

Model Jury Instruction (Criminal) 5.1 ..... 5

## THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR RESOLVING THE QUESTION PRESENTED

The government acknowledges the existence of a well-established inter-circuit conflict regarding the question presented. (Br. Opp. 6 ("the courts of appeals are divided about whether it is error for a district court to decline to issue an inference instruction"), 6-7 n.5 (contrasting rule in the Second, Third, Fourth, Fifth and Tenth Circuits with rule in the First, Sixth, Seventh, Eighth and Eleventh Circuits), 12 (noting "disagreement among the courts of appeals")). Respondents argue only that the instant case does not present an appropriate vehicle for resolving that question.

(1) The requested jury instruction in this case stated that

> if you find that the defendants' explanation about why they took adverse action against a plaintiff is not worthy of belief, you *may* infer a discriminatory or retaliatory motive from that fact.

(Pet. App. 4a) (emphasis added). Respondents assert that this requested instruction was not "a complete and correct statement of the law." (Br. Opp. 6). The government argues that the instruction was defective because, although it properly used the permissive term "may" (rather than "must"), it failed to also contain "language about jurors' not being 'required' to draw such an inference." (Br. Opp. 8). In the proceedings below the government never objected to the instruction on this basis.

The language of proposed instruction is typical of the instructions commonly requested, and in several circuits held mandatory, regarding inferences of discrimination. In *Ratliff v. City of Gainesville*, 256 F.3d 355 (5th Cir. 2001), the Fifth Circuit overturned a jury verdict because the trial judge had refused to give the following instruction.

> If the Plaintiff disproves the reasons offered by Defendants by a preponderance of the evidence, you *may* presume that the employer was motivated by age discrimination.

256 F.3d at 359 (emphasis added). In *Smith v. Borough of Wilkinsburg*, 147 F.3d 272 (3d Cir. 1998), the improperly denied instruction was similar.

> If you find that the Defendant employer's reasons for non-renewal of Plaintiff's employment are false or not credible, you *may* infer that discrimination was the real reason and you *may* find for plaintiff.

(Brief of Appellant, *Smith v. Borough of Wilkinsburg*, No. 97-3133 (3d Cir.) at 13, available at 1997 WL 33552033) (emphasis added). Even the circuits which have refused to require a permissive inference instruction have approved the form of instruction requested in this case.[1] None of these instructions

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[1] In *Gehring v. Case Corp.*, 43 F.3d 340 (7th Cir. 1994), the court commented,

> Gehring also wanted the judge to instruct the jury about one permissible inference: that if it did not believe the

(Continued on following page)

included the special admonition now advocated by the government.

It is not the case, as the government suggests, that all circuits "agree" that a permissive inference instruction is improper unless it includes an express admonition that an inference of discrimination is "not required." (Br. Opp. 6-7). The decisions described in the previous paragraph are all to the contrary. The government is unable to identify a single case in which a proposed jury instruction was ever disapproved, or even challenged, because it lacked the admonition now urged by respondent. In *Ratliff* the EEOC expressly approved the form of the instruction proposed by the plaintiff in that case.[2]

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> employer's explanation for its decisions, it *may* infer that the employer is trying to cover up age discrimination. This is a correct statement of the law....

43 F.3d at 343 (emphasis added).

In *Conroy v. Abraham Chevrolet-Tampa, Inc.*, 375 F.3d 1228, 1235 (11th Cir. 2004), the Court "acknowledge[d] that Conroy's pretext instruction is ... a correct statement of law." That proposed instruction stated that "[d]isbelief of the defendant's explanation *may* be enough to infer discrimination or retaliation." (Initial Brief of Plaintiff-Appellant, *Conroy v. Abraham Chevrolet-Tampa, Inc.*, No. 03-11405-GG (11th Cir.) at 9 (emphasis added), available at 2003 WL 23739368.)

[2] Brief of the Equal Employment Opportunity Commission as *Amicus Curiae*, *Ratliff v. City of Gainesville*, No. 99-41472 (5th Cir.) at 14 ("Ratliff's proposed jury instruction accurately states an important principle of proof in disparate treatment cases").

In the proceedings below the United States never objected on this ground to the instruction requested by petitioner. Respondents' new objection is not limited to the circumstances of this particular case, but attacks the correctness of the most common form of permissive inference instruction. If the government believes that the permissive inference instructions now in use are improper without an express warning that an inference of discrimination is "not required," this case is an excellent vehicle for resolving that objection.

The type of instruction requested in this and other cases is correct even without the additional language now urged by the government. The plain meaning of the word "may" is itself clearly permissive; the jurors would of course understand that an inference they "may" draw was not an inference they were required to make. The jury instructions that were actually given in this case included several instructions regarding what the jury "may" do,[3] language which was clearly different from other instructions from the court delineating things the jury "must" or "should" do.[4] The government did not object to any of these instructions using the term "may," even though none of them included the additional (and redundant) admonition that the jury was "not required" to do any of the permitted things. If a

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[3] Tr. 602, 603.

[4] E.g., tr. 602, 604.

similarly worded requested permissive inference instruction had been given, the jury would assuredly have understood that it was not required to draw the permitted inference.

The United States suggests that any instruction using the term "may" would be improperly "one-sided" if it lacked an express admonition that the inference or other jury action is "not required." (Br. Opp. 8). The principle suggested by this argument would wreak havoc with the jury instructions in use throughout the federal district courts; jury instructions given in most if not all civil and criminal trials use the word "may" without the additional "not required" admonition now insisted upon by respondents. In the Ninth Circuit, for example, there are a number of Model Jury Instructions for criminal cases that utilize the term "may" (without any "not required" caveat) in instructions favorable to the prosecution.[5] The United States cannot seriously be suggesting that district judges should now refuse to

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[5] For example, Model Jury Instruction (Criminal) 4.3 states:

> You have heard evidence of other [crimes] ... engaged in by the defendant. You *may* consider that evidence ... as it bears on the defendant's [*e.g.*, motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident]....

(Emphasis added; see Model Jury Instruction (Criminal) 4.6 (jury "may" consider criminal record in deciding believability of witness); Model Jury Instruction (Criminal) 5.1 (defendant "may" be convicted of aiding and abetting even though he did not personally commit the crime)).

give such common instructions on the ground that they are "one-sided."

(2) The government asserts that the petition failed to contend that the denial of the requested instruction was in any way prejudicial. (Br. Opp. 10). That is not correct. The petition argued at length that

> in the absence of [the requested] instruction juries are likely to ... mistakenly assum[e] that something more than proof of the falsity of an employer's explanation is required to support an inference of discrimination.

(Pet. 21; see Pet. 21-30). The petition specifically contended that "this problem can be avoided only by an instruction from the court, not by mere argument of counsel." (Pet. 25). In the absence of such an instruction, we urged, there would be no way to know whether the jury might have erroneously returned a verdict for the defendant because

> the jury disbelieved the defendant's explanation but concluded, incorrectly, that such a disbelief was not enough to sustain [the plaintiff's] burden of proving ... discrimination.

(Pet. 28) (quoting Brief of the U.S. Equal Employment Opportunity Commission as *Amicus Curiae*, *Conroy v. Abraham Chevrolet-Tampa, Inc.*, No. 03-11405-GG (11th Cir.), 2003 WL 23744565 at *24-*25). The EEOC insists that "[c]ounsel's arguments are not

an adequate substitute for a complete and accurate statement of the law by the judge."[6]

The government in this case takes a contrary view, expressly disagreeing with the position of the EEOC. The United States contends that, at the least, a jury need not be given a permissive inference instruction so long as the trial judge allows counsel for plaintiff to attempt to persuade the jury that the falsity of a defendant's explanation is the type of evidence which could warrant an inference of discrimination. In the court below the government argued that judges should never give a permissive inference instruction, and ought instead require counsel to raise the issue in closing argument.[7]

The contention advanced by respondents is not a case-specific harmless error argument; rather, it goes to the heart of the conflict among the courts of appeals. A central issue which divides the circuits is whether mere argument of counsel can be a sufficient substitute for, or is preferable to, an authoritative statement of the law from the trial judge.

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[6] Brief of the U.S. Equal Employment Opportunity Commission as *Amicus Curiae*, *Conroy v. Abraham Chevrolet-Tampa, Inc.*, No. 03-11405-GG (11th Cir.), 2003 WL 23744565 at *24-*25.

[7] "Permissive inferences should be left to counsel to argue and should not become the responsibility of the trial court." Appellees' Answering Brief, *Browning v. United States of America*, No. 07-35557 (9th Cir.) at 37, available at 2007 WL 4755536.

Respondents assert that lower courts have "consistently" agreed that a *Reeves* jury instruction is unnecessary so long as counsel for the plaintiff is simply permitted to argue to the jury that the falsity of a defendant's explanation is the type of evidence that would warrant an inference of discrimination. (Br. Opp. 11). That is not correct. The Tenth Circuit, for example, insists that a jury instruction is required precisely because argument of counsel is insufficient.

> The dissent relies considerably on the arguments of counsel to take the place of instructions by the judge on this issue. However, the issue is not the mere fact that an inference of discrimination is possible. Rather, the permissibility of an inference of discrimination from pretext alone is a matter of law.... While counsel may be relied on to ... suggest reasoning, the judge's duty to give an instruction on an applicable matter of law is clear. That is particularly true where, as here, the law goes to the heart of the matter.... It is unreasonable, we think, to expect that jurors, aided only by the arguments of counsel, will intuitively grasp a point of law that until recently eluded federal judges who had the benefits of such arguments.

*Townsend v. Lumbermens Mut. Cas. Co.*, 294 F.3d 1232, 1241 n.5 (10th Cir. 2002); see *Ratliff v. City of Gainesville*, 256 F.3d 355, 361 n.7 (5th Cir. 2001) ("jurors ... need some instruction in the permissibility of drawing th[e] inference").

The circuits which refuse to require a permissive inference instruction, on the other hand, agree with the government's contention that arguments of counsel are an adequate substitute for a jury instruction regarding this area of the law. (Br. Opp. 11). Indeed, the Eighth Circuit goes even further, holding that argument of counsel is preferable to a jury instruction. "[T]he judge may and usually should leave the subject to the argument of counsel." *Gehring v. Case Corp.*, 43 F.3d 340, 343 (7th Cir. 1994). The brief in opposition argument highlights the conflict on this pivotal issue. The circumstances of the instant appeal are typical of the cases in which this issue arises; in no instance to our knowledge has a trial judge forbidden counsel for plaintiff to argue to the jury that the falsity of a defendant's evidence would warrant an inference of discrimination. In this regard as well the instant case is an excellent vehicle for resolving the question presented.

The court below erred in holding that argument of counsel renders unnecessary an otherwise mandatory jury instruction. (App. 10a). This Court has repeatedly noted that where an otherwise mandatory instruction has been denied, "arguments of counsel cannot substitute for instructions by the court." *Carter v. Kentucky*, 450 U.S. 288, 303 (1981) (argument of defense counsel no substitute for instruction on presumption of innocence); *Taylor v. Kentucky*, 436 U.S. 478, 420 (1978) (argument of counsel no substitute for instruction that inference of guilt may not be drawn from failure of defendant to testify in criminal case).

"[U]nder any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and ... his lightest word or intimation is received with great deference." *Starr v. United States*, 153 U.S. 614, 626 (1894). The argument of counsel cannot have the same effect. The government notes that in this case – as in most if not all cases – plaintiff's counsel was permitted to "argue" to the jury that proof of the falsity of a defendant's explanation is the type of evidence that would permit an inference (Br. Opp. 10-11); unlike an instruction from the court, however, such an argument of counsel was not a view that the jury was obligated to accept.

(3) The brief in opposition raises for the first time a new objection to the disputed instruction. The requested instruction was unwarranted in this case, the government now argues, because there was insufficient evidence that the defendant's explanations were untrue. (Br. Opp. 8-11). This fact-bound contention was not advanced in the lower courts and cannot be raised at the eleventh hour in this Court as a reason to deny review.

In the court of appeals petitioner emphatically argued in support of the disputed instruction that "[t]here was ample evidence at trial that defendants' explanations ... were not worthy of credence."[8]

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[8] Plaintiff-Appellant's Opening Brief at 45.

> There was ample evidence from which the jury could have found the shifting and inconsistent reasons given for taking action against Browning were unworthy of credence. There was evidence that Browning did not have the performance deficiencies defendants claimed.[9]

Petitioner's appellate brief included a lengthy and detailed summary of the evidence substantiating her contention that the defendant's "grounds for her demotion were false."[10] In the Ninth Circuit the government conspicuously did not dispute either petitioner's summary of that record evidence or her assertion that that evidence was entirely sufficient to support a jury finding that the proffered explanations were untrue. Similarly, in opposing the requested instruction in the trial court, the government never denied that there was sufficient evidence to warrant a jury finding that the defendant's explanations were untrue.

In this Court, however, the government objects that the petition was defective because it did not reiterate the same summary and characterization of the record which petitioner had made, and which the government had not disputed, in the Ninth Circuit. To the contrary, the framing of the petition was entirely appropriate. The petition contains no "argu[ment] that there was a sufficient evidentiary predicate to

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[9] *Id.* at 45-46.

[10] *Id.* at 14; see *id.* at 6-15, 44-47.

justify the district court's including an inference instruction" (Br. Opp. 9) because in the courts below the government had not disputed the existence of that predicate. The petition does not describe the "evidence of pretext" (Br. Opp. 9) because in the court below the government had not disputed the sufficiency of that evidence.

The contents of certiorari petitions would be substantially and pointlessly complicated if petitioners were required to address, and to detail the evidence related to, issues that clearly were not in dispute in the lower courts. The United States would undoubtedly and properly object if its own petitions were on that basis treated as defective. In the instant case petitioner had no reason to anticipate that the government in this Court would change its position and for the first time in the litigation contend that there was insufficient evidence to support a jury finding that its proffered explanations were untrue.

The government suggests that the evidence at trial "did not establish an evidentiary predicate that would have justified the instruction [petitioner] requested." (Br. Opp. 11). Having failed in either the district court or the court of appeals to raise that objection to the proposed jury instruction, however, respondent cannot rely on this argument for the first time in this Court. Had the government chosen to advance this contention in the lower courts, those courts would have been in a position to address that possible justification for the denial of the disputed instruction. The government cannot deliberately

decline to raise such an issue in the lower courts and then oppose review on the ground that its own inaction has resulted in an unresolved fact-bound dispute.

There is, moreover, ample record evidence in this case to support a jury finding that the defendants' explanations for demoting petitioner were false. The trial judge concluded that there was sufficient evidence of pretext to support a jury verdict.[11] The varying justifications asserted by respondents' witnesses for the demotion of the petitioner were repeatedly contradicted by the testimony of petitioner and others. There was also substantial evidence that respondents had taken no action against employees who had the very performance deficiencies with which petitioner was charged. There is no realistic possibility that the lower courts on remand would find plaintiff's evidence insufficient. As a practical matter a resolution of the question presented in favor of petitioner is essentially certain to result in the new trial which petitioner seeks.

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[11] Tr. 578 ("a rational juror could conclude that the plaintiff's race was a motivating factor in ... her having been ... demoted").

## CONCLUSION

For the above reasons, this Court should issue a writ of certiorari to review the judgment and opinion of the court of appeals.

Respectfully submitted,

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